

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:)	
Broderick Wood Products Superfund Site)	
Woodbury Chemical Superfund Site)	
Sand Creek Superfund Site)	
Chemical Sales Company Site)	
Koppers, Inc. Site)	
)	AGREEMENT AND COVENANT
)	NOT TO SUE : Union Pacific Railroad
)	Company
UNDER THE AUTHORITY OF THE)	
COMPREHENSIVE ENVIRONMENTAL)	
RESPONSE, COMPENSATION, AND)	EPA Docket No. CERCLA-08-2004-0006
LIABILITY ACT OF 1980, 42 U.S.C.)	
§ 9601, <u>et seq.</u> , as amended, and the)	
RESOURCE CONSERVATION AND)	
RECOVERY ACT, 42 U.S.C. § 6901,)	
<u>et seq.</u> , as amended.)	
)	

I. INTRODUCTION

1. This Agreement and Covenant Not to Sue (“Agreement”) is made and entered into by and between the United States on behalf of the Environmental Protection Agency (“EPA”), the State of Colorado (“State”) on behalf of the Colorado Department of Public Health and Environment (“CDPHE”), and Union Pacific Railroad Company (“Union Pacific”) (collectively the “Parties” and singularly “Party”).

2. This Agreement is entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9601, et seq., the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901, et seq., and the authority of the Attorney General of the United States to compromise and settle claims of the United States. The State enters into this Agreement pursuant

to Section 25-16-103 C.R.S. and its authority to compromise and settle claims and potential claims of the State.

3. Union Pacific proposes to re-align certain track north of its North Yard in Denver, Colorado to alleviate rail traffic congestion, reduce locomotive idling time and associated air emissions, reduce the number of trains that are required to enter and exit the North Yard, and to provide for a more efficient east-west main line operation through north Denver. The proposed track re-alignment, referred to as the Utah Junction Re-Alignment Project (or “Project”) (named after the junction into and out of Union Pacific’s North Yard known as the Utah Junction), will traverse four Superfund sites: Broderick Wood Products Superfund Site (“Broderick Site”), the Woodbury Chemical Superfund Site (“Woodbury Site”), the Sand Creek Industrial Superfund Site (“Sand Creek Site”), and the Chemical Sales Company Site (“Chemical Sales Site”), and one RCRA-permitted facility, the Koppers, Inc. wood treating facility (“Koppers Site”)(collectively referred to as the “Sites”).

4. This Agreement concerns Union Pacific’s proposed acquisition of perpetual easements and/or other property interests for a railroad right-of-way through each of these Sites (Union Pacific will not acquire the entirety of any one of the Sites). The portion of the Sites to be acquired by Union Pacific is referred to in this Agreement as the “Property” or “Properties.” Union Pacific proposes to implement the Project in two phases, Phase 1 and Phase 2. Phase 1 will include the acquisition of and remedy-related work done on the Broderick Site and the Koppers Site and is expected to be completed by the end of 2004. Phase 2 will complete the Project through the remaining Sites and is anticipated to be initiated in 2005.

5. The Broderick Site is located at 5800 Galapago Street in unincorporated Adams County near Denver, Colorado. The triangular-shaped parcel encompasses about 64 acres situated in a primarily industrial area where Broderick Wood Products Company operated as a wood treating facility from 1947 until 1982. The Broderick Site remediation is now managed by the Broderick Investment Company (“BIC”).

6. The Woodbury Site is located north of 54th Avenue between Harrison and Adams Streets in Commerce City, Colorado. This fifteen-acre site is on the north Denver county line and was operated by Woodbury Chemical Company as a pesticide production facility from the late 1950’s until 1971. Remediation of the Woodbury Site was completed in 1992, and the site was deleted from the National Priorities List (“NPL”) in March 1993. The Woodbury Site includes a vacant lot, the original Woodbury Chemical Company property, vacant property (including a former railroad right-of-way) owned by the Colorado Eastern Railroad Company (“CERC”) or recently transferred to Tom Clark, subject to a Union Pacific option, and an active rail line and railroad right-of-way owned by the Denver Rock Island Railroad (“Denver Rock Island”).

7. The Sand Creek Site is located at 52nd and Dahlia St., approximately five miles northeast of downtown Denver, Colorado in a heavy industrial area. The Site occupies about 550 acres, partly within the City and County of Denver and partly within Commerce City, which is located in Adams County. The Sand Creek Site, which was deleted from the NPL in December 1996, includes vacant property, industrially developed property, vacant property (including a former railroad right-of-way) owned by CERC or recently transferred to NDSC

LLC, subject to a Union Pacific option, and an active rail line and railroad right-of-way owned by the Denver Rock Island.

8. The Chemical Sales Site is located at 4661 Monaco Street in Denver, Colorado and covers approximately five square miles. This site is located in a light industrial area of northeast Denver and was first developed in 1962 with construction of a warehouse. Operations have included the storage and repackaging of bulk chemicals. The Chemical Sales Site was listed on the NPL in August 1990.

9. The Koppers Site is an active industrial wood treating operation adjacent and to the east of the Broderick Site. Soil and groundwater contamination has been identified and is being remediated at the Koppers Site by Beazer East, Inc. ("Beazer"). That remediation includes a groundwater barrier wall along the eastern boundary of Koppers, and a groundwater treatment curtain in the northeast portion of the Koppers property.

10. The properties in which Union Pacific is acquiring an interest and that are covered by this Agreement are located in Adams County or the City and County of Denver. The first property is owned by BIC, other properties are owned by CERC or were recently transferred by CERC to NDSC LLC or Tom Clark, subject to a Union Pacific option (hereinafter the "CERC Property"), others are owned by the Denver Rock Island, and one is owned by Koppers. Union Pacific will acquire various additional parcels under other ownership, but these are not included in any Superfund or other site undergoing environmental remediation and, therefore, are not addressed by this Agreement.

11. Union Pacific, a Delaware Corporation organized under the laws of the State of Delaware, with its principal offices at 1416 Dodge Street in Omaha, Nebraska, desires to acquire

a perpetual easement or other property interest in the above-described properties in order to establish a more direct east-west rail corridor through the north Denver area.

12. The Parties agree to undertake all actions required by the terms and conditions of this Agreement and the Statement of Work attached to this Agreement as Exhibit 1. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Sections VII, VIII, IX, and X, the potential liability of Union Pacific for the Existing Contamination at the Properties which would otherwise result from Union Pacific becoming the owner of, or acquiring a property interest in, the Properties.

13. The Parties agree that Union Pacific's entry into this Agreement, and the actions undertaken by Union Pacific in accordance with the Agreement, do not constitute an admission of any liability by Union Pacific.

14. The resolution of this potential liability, in exchange for provision by Union Pacific to EPA and CDPHE of a substantial benefit as described herein, is in the public interest.

II. DEFINITIONS

15. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

“Broderick Site” shall mean the Broderick Wood Products Superfund Site located at 5800 Galapago Street in unincorporated Adams County near Denver, Colorado, encompassing about 64 acres situated in a primarily industrial area and depicted generally on the map attached as Exhibit 2. The Broderick Site shall include that portion of the Properties referred to herein as

the Broderick Property and all areas to which hazardous substances and/or pollutants or contaminants, have come to be located from the Broderick Site.

“Chemical Sales Site” shall mean the Chemical Sales Company Superfund Site located at 4661 Monaco Street, Denver, Colorado, encompassing approximately five (5) square miles, and depicted generally on the map attached as Exhibit 2. The Chemical Sales Site shall include that portion of the Properties referred to herein as the Chemical Sales Property and all areas to which hazardous substances and/or pollutants or contaminants have come to be located from the Chemical Sales Site.

“CDPHE” shall mean the Colorado Department of Public Health and Environment, Hazardous Materials and Waste Management Division and any successor departments or agencies of the State of Colorado.

“Effective Date” shall have the meaning specified in Section XVI hereof.

“EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

“Existing Contamination” shall mean:

- a. any methane gas, hazardous waste, hazardous substances, pollutants or contaminants present or existing on or under the Properties or any one of the Properties as of the Effective Date of this Agreement;
- b. any methane gas, hazardous waste, hazardous substances, pollutants or contaminants that migrated from the Properties or any one of the Properties prior to the Effective Date of this Agreement; and

- c. any methane gas, hazardous waste, hazardous substances, pollutants or contaminants presently at the Sites or any one of the Sites that migrate onto or under or from the Properties or any one of the Properties after the Effective Date of this Agreement.

“Koppers Site” shall mean that property adjacent to the east of the Broderick Site and depicted generally on the map attached as Exhibit 2 that is owned and operated by Koppers, Inc. (“Koppers”). This 65 acre site utilizes preservative solutions to treat wood products and has a State RCRA Permit ((No. CO-99-03-05-01) for post closure activities related to the Hazardous Waste Disposal Facility (landfill) at the site. The Koppers Site is also the subject of an EPA Administrative Order on Consent for the investigation of the nature and extent of contamination through final remedy selection and a Compliance Order issued by CDPHE for the installation, operation, and maintenance of the interim measures (including the barrier wall and treatment curtain) to halt the offsite flow of contaminants.

“Parties” shall mean the United States on behalf of EPA, the State on behalf of CDPHE, and Union Pacific.

“Phase 1” of the Project shall mean Union Pacific’s acquisition of an easement or other property interest in the Broderick Site and the Koppers Site and the associated repair or replacement of impacted environmental remedy components at those Sites in accordance with the attached SOW.

“Phase 2” of the Project shall mean Union Pacific’s acquisition of an easement or other property interest in the Woodbury Site, the Sand Creek Site, and the Chemical Sales Site and the

associated repair or replacement of impacted environmental remedy components at those Sites in accordance with the attached SOW.

“Project” or “Utah Junction Re-alignment Project” shall mean the entire east-west main line re-alignment effort being undertaken by Union Pacific in north Denver, as described in Section I., ¶ 3., above.

“Properties” shall mean that portion of each of the Sites, encompassing approximately 65 acres, which is depicted generally in Exhibit 2 of this Agreement, that Union Pacific intends to acquire and that is subject to this Agreement.

“Sand Creek Site” shall mean the Sand Creek Industrial Superfund Site encompassing approximately 550 acres, located at approximately 52nd and Dahlia, and partly within the City and County of Denver and partly within Commerce City, which is located in Adams County, and depicted generally on the map attached as Exhibit 2. The Sand Creek Site shall include that portion of the Properties referred to herein as the Sand Creek Property, and all areas to which hazardous substances and/or pollutants or contaminants, have come to be located from the Sand Creek Site.

“State” shall mean the State of Colorado, its departments, agencies, and instrumentalities.

“Statement of Work” or “SOW” shall mean Exhibit 1 attached to this Agreement that describes the scope of the remedy repair and/or replacement work to be performed by Union Pacific in Phase 1 and Phase 2 of the Project.

“Union Pacific” shall mean Union Pacific Railroad Company.

“United States” shall mean the United States of America, its departments, agencies, and instrumentalities.

“Woodbury Site” shall mean the Woodbury Chemical Superfund Site comprised of fifteen acres located north of 54th Avenue between Harrison and Adams Streets in Commerce City, Colorado, and depicted generally on the map attached as Exhibit 2. The Woodbury Site shall include that portion of the Properties referred to herein as the Woodbury Property, and all areas to which hazardous substances and/or pollutants or contaminants, have come to be located from the Woodbury Site.

III. STATEMENT OF FACTS

16. The Broderick Site was listed on the NPL in September of 1984. EPA and BIC entered into a partial consent decree for the Remedial Investigation/Feasibility Study for the Broderick Site in May 1986. Following EPA’s selection of a remedy, interim actions under Operable Unit 1 were completed in May 1990. EPA issued a Record of Decision for the remainder of the Site (OU 2) in March 1992. Land treatment of soils, product recovery, contaminated water treatment and operation and maintenance of a north boundary cut-off wall system have been ongoing since that time. The Broderick Property covered by this Agreement is owned by BIC and is depicted on the map attached as Exhibit 3. Union Pacific has entered into an agreement with BIC to acquire an easement for the Utah Junction Re-alignment Project and to apply certain of the remedial elements at the Broderick Site for treatment of contaminated soils excavated and groundwater produced from the Broderick Site in connection with Phase 1 of the Project. The Broderick Property covered by this Agreement was remediated, or is in the process of being remediated, using BIC’s funds.

17. The Koppers Site is an active industrial operation. Koppers utilizes preservative solutions to treat wood products and has a State RCRA Permit ((No. CO-99-03-05-01) for post

closure activities related to the Hazardous Waste Disposal Facility (landfill) at the Koppers Site. The Koppers Site is also the subject of an EPA Administrative Order on Consent for the investigation of the nature and extent of contamination through final remedy selection, and a Compliance Order issued by CDPHE for the installation, operation, and maintenance of the interim measures (including the barrier wall and treatment curtain) to halt the offsite flow of contaminants. Soil and groundwater contamination have been identified at the Site, and a groundwater barrier wall was installed by Beazer on the eastern boundary of the Koppers Site to halt the offsite flow of contamination, and a groundwater treatment curtain was installed in the northeastern portion of the site to treat impacted groundwater before flowing offsite. Beazer is working with EPA and CDHPE to address the identified environmental concerns at the Koppers Site.

18. The Sand Creek Site was listed on the NPL in December of 1982 and deleted from the NPL on December 20, 1996. The parcels comprising the Sand Creek Property covered by this Agreement are owned by the Colorado Eastern Railroad Company (“CERC”) or were recently transferred to NDSC LLC subject to Union Pacific’s option, or are owned by Denver Rock Island. CERC has entered into a consent decree settlement agreement with the United States and the State whereby, if the United States brings a prospective purchaser to CERC, CERC will deed the requested parcel to the prospective purchaser. The costs for clean up of the Sand Creek Property covered by this Agreement have been reimbursed by CERC and other potentially responsible parties (“PRPs”).

19. The Woodbury Site was listed on the NPL in September 1983. Remediation of the Woodbury Site was completed in 1992, and the site was removed from the NPL in March

1993. The parcels comprising the Woodbury Property covered by this Agreement are owned by CERC or were recently transferred to Tom Clark subject to Union Pacific's option, or are owned by Denver Rock Island. CERC has entered into a consent decree settlement agreement with the United States and the State whereby, if the United States brings a prospective purchaser to CERC, CERC will deed the requested parcel to the prospective purchaser. The costs for clean up of the Woodbury Property covered by this Agreement have been reimbursed by CERC and other PRPs.

20. The Chemical Sales Site was listed on the NPL in August 1990. Remediation efforts at the Chemical Sales Site include use of the Klein Water Treatment Plant for the South Adams County Water and Sanitation District ("SACWSD"), connection of additional residents to SACWSD municipal water supply, removal of leaking and corroded drums of chemicals from the site, and construction of an air sparging/soil-vapor extraction system. Remediation of volatile organic compounds at the site using this remediation system is ongoing.

21. Union Pacific represents, and for the purposes of this Agreement EPA and CDPHE rely on those representations, that Union Pacific has no prior involvement with any of the Properties or any of the Sites.

IV. REMEDY REPAIR AND REPLACEMENT WORK, PAYMENT, CERTIFICATION OF COMPLETION, AND ENVIRONMENTAL COVENANT

22. In consideration of and in exchange for the United States' and State's Covenant Not to Sue in Section VIII and the United States' Removal of Lien in Section XX herein, and subject to the provisions of paragraph 23, below, Union Pacific will pay for or perform the remedy repair and replacement work at the Broderick Site and the Koppers Site described for Phase 1 in the SOW, and to the extent that elements of the remedy at the Sand Creek Site, the

Chemical Sales Site, or the Woodbury Site are impacted by Union Pacific's rail line re-alignment, Union Pacific will also pay for or perform the remedy repair and replacement work for such remedy elements as described for Phase 2 in the SOW. In addition, Union Pacific will reimburse EPA and CDPHE for the costs the agencies incurred in connection with the preparation of this Agreement and the SOW, and which they will incur in overseeing Union Pacific's performance of Phase 1 and Phase 2 work. For purposes of this Agreement and invoicing by EPA as described in paragraph 24 below, costs associated with the preparation of this Agreement and SOW shall be considered part of Phase 1 oversight costs.

23. Should EPA select the offsite disposal alternative described in Section II, 1.2.2 of the attached SOW, Union Pacific may terminate this Agreement. In order to terminate this Agreement, Union Pacific shall notify EPA and CDHPE in writing within 10 days after EPA's selection of such alternative, and Union Pacific shall, within 30 days of receipt of invoice, pay the United States' and the State's documented costs incurred to the date of termination in connection with the preparation of this Agreement, the SOW, and related documents.

24. The EPA and Union Pacific will seek to agree upon the amount of a lump sum advance payment for EPA's oversight costs for Phase 1, to be paid by Union Pacific, within 60 days of the Effective Date, in accordance with the payment of costs provisions of Section XIV, ¶ 47. If EPA and Union Pacific cannot agree on a lump sum figure for Phase 1 oversight costs prior to the commencement of Phase 1 field work, Union Pacific shall reimburse EPA for the documented costs incurred in performing oversight of Phase 1, as invoiced by EPA in an amount not to exceed \$915,000, subject to Union Pacific's right to dispute accounting errors and costs incurred inconsistent with the National Oil and Hazardous Substances Pollution Contingency

Plan, in accordance with the dispute resolution procedures set forth in Exhibit 5. Union Pacific agrees to make a lump sum advance payment of CDPHE's oversight costs for Phase 1 in the amount of \$93,617.00; \$84,992.00 of which shall be paid to the "Colorado Hazardous Substances Response Fund" and \$8,625.00 of which shall be paid to the "Colorado Hazardous Waste Service Fund." Union Pacific shall make these payments within 60 days of the Effective Date, in accordance with the payment provisions of Section XIV, ¶ 48. Once the Phase 2 scope of work has been defined consistent with this Agreement, the Parties will seek to agree upon the amount of a lump sum advance payment for EPA's and CDPHE's oversight costs for Phase 2 and the schedule for such payment. If the Parties cannot agree prior to the commencement of Phase 2 work, Union Pacific shall reimburse EPA and CDPHE for the documented costs incurred in performing oversight of Phase 2 work, invoiced by EPA and CDPHE. If a lump sum payment is not agreed to by the Parties for Phase 2 oversight costs, Union Pacific shall pay such costs within 30 days of receipt of invoice, in accordance with the payment provisions of Section XIV, ¶¶ 47 and 48, subject to Union Pacific's right to dispute accounting errors and costs incurred inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan or, as relates to the State, costs incurred inconsistent with the Colorado Administrative Procedures Act, in accordance with the dispute resolution procedures set forth in Exhibit 5.

25. After Union Pacific concludes each phase (Phase 1 and Phase 2) of the SOW, Union Pacific shall so notify EPA and CDPHE and shall schedule and conduct a pre-certification inspection to be attended by the Parties. After the pre-certification inspection, Union Pacific shall submit a written report to EPA and CDPHE requesting approval of its Certification of

Completion. In the report, a registered professional engineer, licensed in the State of Colorado, and Union Pacific's Project Coordinator shall certify that work has been constructed in full satisfaction of the requirements of this PPA and SOW. The written report shall include as-built drawings signed and stamped by a professional engineer, licensed in the State of Colorado.

26. If, after completion of the pre-certification inspection and receipt and review of the written report, EPA or CDPHE determine that the work or any portion thereof has not been accomplished in accordance with this PPA, EPA and/or CDPHE will notify Union Pacific in writing of additional work that must be undertaken by Union Pacific pursuant to this PPA to satisfactorily complete the work; provided, however, that Union Pacific may only be required to perform additional work pursuant to this Paragraph to the extent necessary and consistent with the PPA and SOW.

27. If EPA and CDPHE conclude, based on the initial or any subsequent report requesting Certification of Completion that the work has been completed in accordance with this PPA, EPA and CDPHE will approve Union Pacific's Certification of Completion, in writing to Union Pacific.

28. Union Pacific's obligations under Phase 1 of the SOW shall be deemed completed upon the issuance by EPA and CDPHE of their approval of Union Pacific's Certification of Completion of the Phase 1 scope of work. Union Pacific's obligations under the SOW shall be deemed completed upon issuance by EPA and CDPHE of their approval of Union Pacific's Certification of Completion of the Phase 2 scope of work.

29. To the extent that an environmental covenant substantially in the form attached to this Agreement as Exhibit 4 is placed on any or all of the Properties, CDPHE agrees to provide

Union Pacific an opportunity to review and comment on any proposed environmental covenant. Union Pacific agrees that it shall execute and record its subordination agreement within 60 days of the date the environmental covenant is recorded, indicating that it will be subject to and bound by any such final environmental covenant, notwithstanding Union Pacific's acquisition of its property interest before the environmental covenant has been placed on that Property. Notice of recording the subordination agreement shall be sent to those persons listed in Section XV (Notices and Submissions) within 60 days of the date Union Pacific records the subordination agreement.

V. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

30. Commencing upon each of the dates that it acquires title to the Properties, Union Pacific agrees to provide to EPA and CDPHE, their authorized officers, employees, representatives, and all other persons performing oversight actions by or on behalf of EPA or CDPHE, an irrevocable right of access at all reasonable times during the performance of the work required of Union Pacific under this Agreement to the Properties and to any other property to which access is required for such oversight actions at the Sites, to the extent access to such other property is controlled by Union Pacific, for the purposes of overseeing the work required of Union Pacific under this Agreement at the Sites under federal and State law; provided, however, that such EPA and CDPHE access is subject to full compliance with all applicable EPA, OSHA, and FRA safety requirements, and Union Pacific Health and Safety Plan(s). EPA and CDPHE agree to provide reasonable notice to Union Pacific of the timing of their oversight actions to be undertaken at the Properties. Notwithstanding any provision of this Agreement, but subject to the above safety requirements, EPA and CDPHE retain all of their access authorities

and rights, including enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, (“RCRA”) et seq., and any other applicable Federal or State statute or regulation, including any amendments thereto.

31. Union Pacific shall ensure that assignees, successors in interest, lessees, and sublessees of each of the Properties shall provide the same access and cooperation and implementation of Institutional Controls. Union Pacific shall ensure that a copy of this Agreement is provided to any subsequent assignees or transferees of any of the Properties or an interest in any of the Properties, consistent with this Section, and Section XI (Parties Bound/Transfer of Covenant), of the Agreement.

VI. APPROPRIATE CARE/COOPERATION

32. Notwithstanding any other provision of this Agreement, Union Pacific shall exercise appropriate care, as set forth in section 101(40)(D) of CERCLA, 42 U.S.C. §9601(40)(D), and shall comply with all applicable local, State, and federal laws and regulations in regards to Existing Contamination. Union Pacific agrees to cooperate fully with EPA and CDPHE in BIC’s continuing implementation of response actions at the Broderick Site and the implementation of response actions at each of the other Sites and further agrees not to interfere with such response actions. EPA and CDPHE agree, consistent with their respective responsibilities under applicable law, to use reasonable efforts to minimize any interference with Union Pacific's operations by such entry and response. In the event Union Pacific becomes aware of any action or occurrence which causes or threatens a release of hazardous substances or pollutants or contaminants at or from any of the Sites that constitutes an emergency situation or

may present an immediate threat to public health or welfare or the environment, Union Pacific shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. §9603, or any other law notify EPA and CDPHE of such release or threatened release.

VII. CERTIFICATION

33. By entering into this Agreement, Union Pacific certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA and CDPHE all information known to Union Pacific and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of methane gas, hazardous waste, hazardous substances or pollutants or contaminants at or from any of the Sites and to its qualification for this Agreement. Union Pacific also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at any of the Sites. If the United States or the State determines that information provided by Union Pacific is not materially accurate and complete, the Agreement, within the sole discretion of the United States or the State, shall be null and void, and the United States and the State reserve all rights they may have.

VIII. UNITED STATES' AND STATE'S COVENANT NOT TO SUE

34. Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Remedy Repair and Replacement Work, Payment, Certification of Completion, and Environmental Covenant) and upon certification of

completion of the work specified in Section IV (Remedy Repair and Replacement Work, Payment, Certification of Completion, and Environmental Covenant) respectively for Phase 1 and Phase 2 of the Project, the United States and the State covenant not to sue or take any other civil or administrative action against Union Pacific for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a) or Sections 3008(h) and 7003 of RCRA, 42 U.S.C. 6928(h) and 6973, with respect to the Existing Contamination related to that phase of work.

IX. RESERVATION OF RIGHTS

35. The Covenant Not to Sue set forth in Section VIII above does not pertain to any matters other than those expressly specified in Section VIII (United States' and State's Covenant Not to Sue). The United States and the State reserve and the Agreement is without prejudice to all rights against Union Pacific with respect to all other matters, including but not limited to, the following:

- (a) claims based on a failure by Union Pacific to meet a requirement of this Agreement, including but not limited to Section IV (Remedy Repair and Replacement Work, Payment, Certification of Completion, and Environmental Covenant), Section V (Access/Notice to Successors in Interest), Section VI (Appropriate Care/Cooperation), Section XIV (Payment of Costs);
- (b) any liability resulting from past or future releases of hazardous substances or pollutants or contaminants, at or from the Sites caused or contributed to by Union Pacific, its successors, or assignees, lessees or sublessees, except

as necessary to complete work specified in the SOW;

- (c) any liability resulting from exacerbation by Union Pacific, its successors, assignees, lessees or sublessees, of Existing Contamination;
- (d) any liability resulting from the release or threat of release of hazardous substances or pollutants or contaminants by Union Pacific, at any of the Sites after the Effective Date of this Agreement, not within the definition of Existing Contamination;
- (e) criminal liability;
- (f) liability for damages for injury to, destruction of, or loss of natural resources and for the costs of any such natural resource damage assessment incurred by the State and by federal agencies other than EPA; and
- (g) liability for violations by Union Pacific of local, State or federal law or regulations.

36. With respect to any claim or cause of action asserted by the United States or the State, Union Pacific shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable to Existing Contamination or work performed pursuant to the SOW.

37. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States or the State may have against any person, firm, corporation or other entity not a party to this Agreement.

38. Nothing in this Agreement is intended to limit the right of EPA or CDPHE to

undertake future response actions at any of the Sites or to seek to compel parties other than Union Pacific to perform or pay for response actions at any of the Sites. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by EPA or CDPHE in exercising its authority under federal or State law. Union Pacific acknowledges that it is purchasing Properties where additional response actions may be required.

X. UNION PACIFIC'S COVENANT NOT TO SUE

39. In consideration of the United States' and the State's Covenant Not To Sue in Section VIII of this Agreement, Union Pacific hereby covenants not to sue and not to assert any claims or causes of action against the United States or the State, their authorized officers, employees, or representatives with respect to the Sites or this Agreement, including but not limited to, any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States or the State, including any department, agency or instrumentality of the United States or the State under CERCLA Sections 107 or 113 related to any of the Sites, or any claims arising out of the activities at the Sites to be undertaken by Union Pacific under this Agreement, including claims based on EPA's or CDPHE's oversight of such activities or approval of plans for such activities.

40. Union Pacific reserves, and this Agreement is without prejudice to, actions against the United States or the State based upon their respective direct negligence, not including oversight or approval of the Union Pacific's plans or activities, that are brought pursuant to any

statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XI. PARTIES BOUND/TRANSFER OF COVENANT

41. This Agreement shall apply to and be binding upon the United States and the State, and shall apply to and be binding upon Union Pacific, its officers, directors, and employees. The United States' and State's Covenant Not to Sue in Section VIII and Contribution Protection in Section XVIII shall apply to Union Pacific's officers, directors, or employees, to the extent that the alleged liability of the officer, director, or employee is based on his/her status and in his/her capacity as an officer, director, or employee of Union Pacific, and not to the extent that the alleged liability arose independently of the alleged liability of Union Pacific. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

42. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Union Pacific under this Agreement may be assigned or transferred to any person with the prior written consent of EPA and CDPHE in their sole discretion.

43. Union Pacific agrees to pay the reasonable costs incurred by EPA and CDPHE to review any subsequent requests for consent to assign or transfer the benefits conferred by this Agreement.

44. In the event of an assignment or transfer of any of the Properties or an assignment

or transfer of an interest in any of the Properties, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as EPA, CDPHE, and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Property, the assignee or transferee must consent in writing to be bound by the terms of this Agreement including but not limited to the certification requirement in Section VII of this Agreement in order for the Covenant Not to Sue in Section VIII to be available to that party. The Covenant Not To Sue in Section VIII shall not be effective with respect to any assignees or transferees who fail to provide such written consent to EPA and CDPHE.

XII. DISCLAIMER

45. This Agreement in no way constitutes a finding by EPA or CDPHE as to the risks to human health and the environment which may be posed by contamination at any of the Properties or the Sites, nor constitutes any representation by EPA or CDPHE that any of the Properties or the Sites is fit for any particular purpose.

XIII. DOCUMENT RETENTION

46. Union Pacific agrees to retain and make available to EPA and CDPHE all non-privileged records, contracts, studies and investigations, and documents relating to environmental issues or remedy repair or replacement work done by Union Pacific under this PPA and SOW at the Properties, for at least ten years after the completion of each of the two Phases of work, as evidenced by EPA's and CDPHE's approval of the Certification of Completion for each Phase, as provided for in Section IV of this Agreement, unless otherwise agreed to in writing by the Parties. At the end of such ten-year period, Union Pacific shall notify

EPA and CDPHE of the location of such documents and shall provide EPA and CDPHE with an opportunity to copy any such documents at the expense of EPA or CDPHE.

XIV. PAYMENT OF COSTS

47. Union Pacific shall make all payments to the United States required by this Agreement in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund," referencing the EPA Region, EPA Docket number, and Site/Spill ID# 08-31, DOJ case number and name and address of Union Pacific. Union Pacific shall send the check(s) to:

Regular Mail:

Mellon Bank
Attn: Superfund Accounting
Lockbox 360859
Pittsburgh, PA 15251-6859

Federal Express, Airborne, etc.:

Environmental Protection Agency 360859
Mellon Client Service Center Rm 670
500 Ross Street
Pittsburgh, PA 15262-0001

Wire transfers must be sent directly to the Federal Reserve Bank in New York City with the following information:

ABA = 021030004
TREAS NYC/CTR/
BNF=/AC-68011008

Notice of payment shall be sent to those persons listed in Section XV (Notices and Submissions) and to the EPA Region 8 Financial Management Officer at the following address or as otherwise directed in writing by EPA:

Union Pacific PPA

Broderick Wood Products Superfund Site
Mail Code: 8TMS-F
U.S. Environmental Protection Agency
999 18th Street, Suite 300
Denver, CO 80202

The amount to be paid by Union Pacific pursuant to this Paragraph for Phase 1 shall be deposited in the Broderick/Utah Junction Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Broderick Wood Products Superfund Site or transferred by EPA to the Hazardous Substances Superfund. The amount to be paid by Union Pacific pursuant to this Paragraph for Phase 2 work impacting either the Sand Creek Superfund Site, the Chemical Sales Superfund Site, or the Woodbury Superfund Site shall be deposited in the Special Account established for that particular Site within the EPA Hazardous Substance Superfund, i.e., the Sand Creek/Union Pacific Special Account, the Chemical Sales/Union Pacific Special Account, or the Woodbury/Union Pacific Special Account, respectively, to be retained and used to conduct or finance response actions at or in connection with that particular Site or transferred by EPA to the Hazardous Substances Superfund.

48. Union Pacific shall make all payments to the State required by this Agreement in the form of certified or cashiers check or checks made payable as follows:

(a) Payment to the "Colorado Hazardous Substances Response Fund" shall reference the "Broderick Superfund Site, Union Pacific Railroad Project Matter," or as otherwise directed by CDPHE. Payment shall be sent to CDPHE at the following address:

Colorado Department of Public Health and Environment
Hazardous Materials and Waste Management Division
Remedial Programs Section
4300 Cherry Creek Drive South
Denver, CO 80222-1530

(b) Payment to the “Colorado Hazardous Waste Service Fund” shall reference the “Koppers Site, Union Pacific Railroad Project Matter,” or as otherwise directed by CDPHE.

Payment shall be sent to CDPHE at the following address:

Colorado Department of Public Health and Environment
Hazardous Materials and Waste Management Division
4300 Cherry Creek Drive South
Denver, CO 80222-1530
Attention: Mira Neumiller

Notice of payment shall be sent to those persons listed in Section XV (Notices and Submissions). The amount to be paid by Union Pacific pursuant to this Paragraph shall be deposited in a subaccount(s), allocated for use at the Broderick Wood Products, Koppers Site, Chemical Sales Company, Sand Creek, or Woodbury Chemical Company Superfund Sites used to conduct or finance response actions, including oversight activities, at or in connection with the Union Pacific Railroad Company actions or transferred by CDPHE to the general Hazardous Substances Response Fund or the Hazardous Waste Service Fund.

49. If Union Pacific fails to comply with the terms of this Agreement, including, but not limited to, the provisions of Section IV (Remedy Repair and Replacement Work, Payment, Certification of Completion, and Environmental Covenant), of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States and the State to enforce this Agreement or otherwise obtain compliance.

50. Amounts due and owing pursuant to the terms of this Agreement but not paid in accordance with the terms of this Agreement shall accrue interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), compounded on an annual basis.

XV. NOTICES AND SUBMISSIONS

51. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Agreement with respect to the United States, EPA, the State, and Union Pacific, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice (DJ# 90-7-1-254/1)
Washington, D.C. 20044-7611

As to EPA:

Director
Legal Enforcement Program
Mail Code: 8ENF-L
U.S. Environmental Protection Agency,
Region 8
999 18th Street, Suite 300
Denver, Colorado 80202

Colorado Superfund Team Leader
Mail Code: 8EPR-SA
U.S. Environmental Protection Agency,
Region 8
999 18th Street, Suite 300
Denver, Colorado 80202

Union Pacific PPA

As to the State:

Superfund Unit Leader
Colorado Department of Public Health and Environment
Hazardous Materials and Waste Management Division
4300 Cherry Creek Drive South
Denver, Colorado 80246-1530

Colorado Department of Law
Natural Resources Section
1525 Sherman Street, Fifth Floor
Denver, CO 80203

Attention: First Assistant Attorney General for – Hazardous and Solid Waste

As to Union Pacific:

Gary L. Honeyman
Manager Environmental Site Remediation
Union Pacific Railroad Company
221 Hodgeman
Laramie, WY 82072

David P. Young
National Environmental Counsel
Union Pacific Railroad Company
808 Travis
Suite 620
Houston, TX 77002

XVI. EFFECTIVE DATE

52. The Effective Date of this Agreement shall be the date upon which EPA and CDPHE issue written notice to Union Pacific that the United States and the State have fully executed the Agreement after review of and response to any public comments received.

XVII. TERMINATION

53. If any Party believes that any or all of the obligations under Section V (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Parties agree to

terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the Party requesting such termination receives written agreement from the other Parties to terminate such provision(s).

XVIII. CONTRIBUTION PROTECTION

54. With regard to claims for contribution against Union Pacific, the Parties hereto agree that Union Pacific is entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Agreement. The matters addressed in this Agreement are all response actions taken or to be taken and response costs incurred or to be incurred by the United States, the State, or any other person with respect to Existing Contamination.

55. Union Pacific agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States and the State in writing no later than 60 days prior to the initiation of such suit or claim.

56. Union Pacific also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States and the State within 10 days of service of the complaint on Union Pacific, or such reasonable time thereafter as to avoid prejudice to the United States and the State.

XIX. EXHIBITS

57. Exhibit 1 is the Statement of Work.

58. Exhibit 2 is the map depicting all of the Sites addressed by this Agreement.

59. Exhibit 3 is the map depicting the Union Pacific trackage re-alignment on the Broderick Site .

60. Exhibit 4 shall mean the form of environmental covenant to which Union Pacific

Union Pacific PPA

has agreed to be subject.

61. Exhibit 5 shall mean the Dispute Resolution Procedures to be applied in the event of a dispute concerning oversight costs.

XX. REMOVAL OF LIEN

62. Subject to the Reservation of Rights in Section IX of this Agreement, EPA agrees to remove, or make subject to Union Pacific's property interest, any lien it may have on any of the Properties under Section 107(l) of CERCLA, 42 U.S.C. § 9607(l), as a result of response action conducted by EPA at that Property.

XXI. PUBLIC COMMENT

63. This Agreement shall be subject to a fifteen-day public comment period, after which EPA and/or CDPHE may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

XXII. COUNTERPARTS AND FACSIMILE SIGNATURES

64. This Agreement may be executed by the Parties in any number of counterparts, each of which shall be deemed an original instrument, but all of which together shall constitute but one and the same instrument. Facsimile signatures shall be considered binding.

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY

Kerrigan Clough for/ Jan 29, 2004

ROBERT E. ROBERTS Date
Regional Administrator
U.S. Environmental Protection Agency, Region 8

IT IS SO AGREED:

UNITED STATES DEPARTMENT OF JUSTICE

BY:

SIGNED **2/17/04**

W. BENJAMIN FISHEROW
Deputy Section Chief
Environmental Enforcement Section
U.S. Department of Justice
Post Office Box 7611
Ben Franklin Station
Washington, D.C. 20044

SIGNED **2/4/2004**

JEREL L. ELLINGTON
Senior Counsel
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
999 18th Street, Suite 945N
Denver, Colorado 80202
Telephone: (303) 312-7321

Union Pacific PPA

IT IS SO AGREED:

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT
BY:

SIGNED	1-30-04
HOWARD ROITMAN	Date
Director of Environmental Program	
Colorado Department of Public Health and Environment	

IT IS SO AGREED:

COLORADO DEPARTMENT OF LAW
KEN SALAZAR
Attorney General

SIGNED	2/2/04
ROBERT J. EBER	Date
Assistant Attorney General	

IT IS SO AGREED:

UNION PACIFIC RAILROAD COMPANY
BY:

SIGNED	1-14-04
LAWRENCE E. WZOREK	Date
Assistant Vice President	
Law	

Union Pacific PPA

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

Elliott J. Gillarey for/ **2/6/04**

SUSAN E. BROMM Date

Director,

U.S. Environmental Protection Agency

Office of Site Remediation Enforcement

Union Pacific PPA

Exhibit 1
Statement of Work

Exhibit 2
Map Depicting General Location of All Superfund and RCRA
Sites Addressed by this Agreement

Exhibit 3
Detail View of the Property to be Acquired from the Broderick
Superfund Site

Exhibit 4
Form of Environmental Covenant

Exhibit 5
Dispute Resolution Procedures

IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE REGIONAL HEARING CLERK.

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON FEBRUARY 24, 2004.